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IN THE

Supreme Court of the United States

October Term, 1956

No. 987

JOHN SZEKELY, also known professionally as JOHN PEN,

Respondent,

v.

EAGLE LION FILMS, INC.,

Petitioner,

and

GENERAL FILM DISTRIBUTORS LTD., J. ARTHUR RANK, ROD GEIGER and NAT BRONSTEN,

Defendants.

PETITION OF EAGLE LION FILMS, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully alleges:

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (printed in Appendix annexed hereto at pp. A-1-6) is reported at 242 F. (2nd) 266.

The opinion of the District Court (printed at pp. 9a to 24a of Petitioner's (Appellant's) Appendix in the Court of Appeals) is reported at 140 F. Supp. 843.

Jurisdiction

The judgment of the Court of Appeals was entered on March 19, 1957. A timely petition for a rehearing was denied by order dated and filed on April 10, 1957. The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, C. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

Statute Involved

The Act of July 30, 1947, c. 391, 61 Stat. 652, 17 U. S. C.:

"§1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; * * *

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; * * * and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. * * * "

Questions for Review

1. Where a writer (respondent) is hired by the producer-owner of the motion picture rights (Geiger Productions, Inc.), to write a screen adaptation of a copyrighted novel ("CHRIST IN CONCRETE") and reserves title in the script until he is paid, and where the producer makes only part payment but the respondent delivers the script to the

producer and deliberately stands by and permits the filming and distribution of the picture because he believes this is the best way for the producer to obtain funds to pay him—but thereafter sues petitioner which is a secondary distributor, for infringement of his screen adaptation because the producer had not paid him the full fee—

(a) Did not the learned Courts below *err* in holding that the "value" of respondent's screen adaptation was diminished by petitioner's distribution of the picture, since the screen adaptation was *not* an original work which respondent could sell, publish, produce or license others to do, but was merely an adaptation which only the copyright owner or the producer-owner of the motion picture rights could use (Copyright Law, Section I; *Kalem* v. *Harper Bros.*, 222 U. S. 55; *Dam* v. *Kirk La Shelle Co.*, 175 Fed. 902; *Harper Bros.* v. *Klaw*, 232 Fed. 609)—hence petitioner's distribution of the picture could not have deprived respondent of rights which he never had?

(b) Should not the learned Courts below have held that since respondent never had the right to sell, publish, produce or otherwise exploit the screen adaptation, that therefore petitioner's distribution could not have injured respondent (even though technically his script may have ben infringed), and respondent's recovery, if any, should have been limited to nominal damages—as this Honorable Court did in reversing in *Coupe* v. *Royer*, 155 U. S. 565, 583? (cf. *Underwood* v. *E. C. Stearns & Co.* (277 Fed. 74, 83; "Restatement of the Law-Torts", Section 912, p. 585; Section 907, p. 553).

(c) In view of respondent's admission, and the District Court's finding of fact, to the effect that respondent deliberately allowed the production and distribution of the picture to proceed, because this course presented "his best chance of procuring a

payment on account of the amount due him from Geiger Productions'' (p. 23a)—did not the learned Courts below *err* in failing to hold that respondent was estopped from seeking recovery for any alleged damages by reason of the distribution of the motion picture which respondent himself induced?

2. Did not the learned Court of Appeals *err* when, *in effect,* it held that respondent's notice claiming title to the script (because the producer didn't pay his full fee), required petitioner to surrender its distribution contract to the producer so that the respondent and the producer might resell those distribution rights to others and thus enable the producer to pay the balance of respondent's fee?

3. Even assuming *arguendo* that such a confiscatory rule of law obtains—did not the learned Courts below *err* in assuming that the unpaid portion of employment fee ($25,000) was the proper amount to award as damages? And in any event, should not the Courts below have required respondent to submit proof that even if petitioner had surrendered its distribution rights, that there was someone ready, able and willing to pay at least $25,000 for such distribution rights?

Statement of the Case

This is an action for infringement of respondent's uncopyrighted * screen adaptation of Pietro Di Donato's copyrighted novel entitled ''Christ in Concrete'' (Finding 6, p. 10a).

Federal jurisdiction rests upon diversity of citizenship (par. "Eighth" of complaint, p. 31a).

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* Respondent claims common law copyright.

The sole act by petitioner upon which the action is based, is petitioner's sub-distribution of the motion picture (R. p. 43)* produced by Rod E. Geiger Productions, Inc., which was the exclusive licensee and owner of the motion picture rights granted by the author and copyright owner Di Donato (Findings 4 and 5, p. 10a).

Under Section 1 of the Copyright Law, the owner of the copyright has the exclusive right to make a motion picture of his copyrighted literary work.

In November 1947, respondent was employed by the Producer Rod E. Geiger Productions Inc., *not* a party to this action, to write a screen adaptation of Di Donato's copyrighted novel, for which the Producer was to pay respondent $35,000 (see employment agreement Ex. 5, pp. 45a-52a). Under the employment agreement, respondent reserved title to his script until the producer paid the full employment fee (Par. 6 of agreement, p. 48a).

Though the producer had paid respondent only $10,000 (instead of $22,500 required to be paid in advance of respondent's submission of his final draft of the screen adaptation; cf. subdivisions (a), (b) and (c) of par. 3 of Ex. 5; also producer's letter to respondent Ex. 9, p. 57a), respondent nevertheless overlooked the producer's default occasioned by the producer's financial difficulties (Ex. 9, p. 56a), and delivered his final draft of the script to the producer early in 1948 (see Finding 7, p. 11a; Ex. 9, p. 56a).

In March 1948, the producer wrote respondent that the producer had employed one Barzman to make changes in the script (Finding 8, p. 11a); and the filming of the picture was completed in England during 1949 (Finding 13, p. 13a).

Thereafter, the producer conveyed the distribution rights to General Film Distributors, Ltd. of England, which in turn sublicensed the distribution rights for the U. S. A. to the petitioner herein (p. A-2, infra).

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* "Mr. Aslan (Resp't's Att'y): All I am contending is Eagle Lion has distributed this picture, that is all."

In November 1949, respondent learned from "Variety" a trade paper, that the picture was about to be distributed in this country by petitioner under a sublicense from the English distributor (p. 13a). Respondent expressly conceded that he deliberately refrained from taking any legal steps to restrain the completion or the distribution of the picture because of his "belief that his best chance of getting paid was to allow completion of the filming and distribution" (see Finding of Fact 12, p. 13a, also 23a), and respondent knew "that Rod E. Geiger Productions, Inc., had no assets except if the film were successful and earned a profit * * *" (R. p. 131).

It is not disputed that no advice as to respondent's reservation or claim of title to the script, was ever communicated to petitioner until February 7, 1950 (respondent's letter Ex. 7, p. 54a)—which was more than *three months after* respondent read in "Variety" of the impending release of the picture in New York which occurred on December 20, 1949 (see Finding 16, p. 14a). Respondent further concedes that he read all the press reviews of the picture in December 1949 (R. p. 104); and even then waited almost two months (i.e. from December 20, 1949 to February 7, 1950) before asserting any claim of title to the script. Respondent's prior letter of November 29, 1949 (Ex. 6, p. 53a) to which reference is made in both opinions below, makes no mention whatever of any claim of title to the script. On the contrary—even if petitioner had received Ex. 6 (which petitioner denied receiving), it would have conveyed a contrary conclusion for all that it stated was that respondent's employer still owed him part of his fee. It is settled law, that the copyright to a work by an employee, belongs to the employer. The Copyright Law so provides. 17 U. S. C. A. 26; cf. *Bleistein* v. *Donaldson Lith Co.* (188 U. S. 239, 248; and cases there cited). The Court of Appeals' comment that petitioner "had notice of plaintiff's claim several weeks prior to the distribution

and chose to ignore it"—is therefore contradicted by respondent's own letters which constitute the *only* evidence in the case on this subject—unless by "claim" is meant that respondent advised that he had not been paid fully. The first claim of *title* was not asserted until February 7, 1950 (Ex. 7, p. 54a)—almost two months *after* petitioner's release of the picture.

There were no profits only substantial losses—hence respondent waived an accounting and "elected to rely solely on a claim for damages".

On the trial (without a jury) when it had been established that the picture was a box-office failure and that petitioner had sustained losses in the sub-distribution of the picture ("Decision" 19a, also R. p. 253) which continued for a period of approximately six months (i.e. until June 1950 when petitioner discontinued its motion picture distribution business, see Finding 2, p. 10a), respondent expressly waived its right to an accounting, and "elected to rely solely on a claim for damages" (See Dist. Ct. "Decision", p. 19a). In the Opinions below, erroneous references are made to alleged payments to the producer by petitioner. But Exhibits "I" and "J" expressly show that there never were any payments to the producer and that only $1,320.76 was remitted to petitioner's licensor G. F. D. Ltd. Though this subject is not pertinent to any issue herein, and played no part in the lower Court's determination being mere dicta, we nevertheless respectfully mention it lest it give false coloration to the surrounding circumstances in this case.

The $25,000 damages awarded were equivalent to the unpaid balance of the fee owed by the producer.

The District Court awarded respondent the sum of $25,000 as damages—which was the equivalent of the unpaid balance of the employment fee owed by the producer to respondent—plus interest from the date of the first exhibition

of the picture—December 20, 1949—(less 2 years and 8 months because of the delay in trial caused by plaintiff). Concerning the amount of the award the Trial Court said:

> "The award of damages in this case will give him all that he properly could have expected in the way of monetary damages". (p. 23a)

thus revealing a subconscious intention to make respondent whole.

Respondent himself and both Courts below conceded that only the producer-owner of the motion picture rights could use respondent's screen adaptation—and that respondent could not.

This substantial award was made in spite of the fact that the respondent himself conceded on the trial as well as in his brief in the Court of Appeals (p. 35 lines 3-16), and the learned District Judge had ruled—in keeping with settled principles—that respondent could *not* sell, publish, produce or otherwise exploit or license anyone, other than his employer-producer to employ his screen adaptation for any purpose whatever. Copyright Law, Section I; *Kalem* v. *Harper Bros.* (222 U. S. 55); *Dam* v. *Kirk LaShelle* (175 Fed. 902), *Harper Bros.* v. *Klaw* (232 Fed. 609).

Thus, though on the trial, the learned Trial Court excluded respondent's expert witness' testimony as to alleged market value of the script, stating:

> "The Court: It is a different situation from somebody who writes a screen play which he has the right to go out and sell. The plaintiff admits he has no right to sell it.
>
> "Mr. Aslan (Respondent's attorney): That is right" (R. p. 277).

in his "Decision" he nevertheless rested his award of $25,000 upon a *contrary* conclusion:

> "Obviously, the value of the manuscript has been destroyed, *since the motion picture has been pro-*

duced and distributed, and there would be no opportunity for the sale of the manuscript now to anybody else". (p. 20a) (Emphasis ours).

Both on the trial as well as in his brief in the Court of Appeals, respondent himself conceded that he was always aware of the legal principles which prohibited him from using his script for any purpose, other than for his use by the producer. Thus, on the trial, respondent testified:

> "Q. You knew, did you not, when you undertook and accepted this employment from Rod E. Geiger Productions, Inc. that Rod E. Geiger Productions Inc. had an exclusive license from Pietro di Donato to make the motion picture based on the book, is that right? A. Yes.
>
> "Q. You knew that when you wrote that script based on the book that you couldn't dispose of it to anyone else, could you? You knew that? A. Yes, of course.
>
> "Q. As you expressed yourself today—because it was based on the book, you couldn't do anything with it? A. Yes.
>
> * * *
>
> "Q. You couldn't go out and make a motion picture with the script, could you? A. No.
>
> "Q. And that was primarily due to the fact that the exclusive license was in Rod E. Geiger's Productions, Inc., isn't that right? A. Yes.
>
> "Q. No one else, you or I or no one else, could make a picture based on that book because of that license from Donato to Rod E. Geiger Productions, Inc., isn't that correct? A. Yes" (R., pp. 113-114 cf. pp. 117-118).

And in his brief in the Court of Appeals, respondent conceded:

> "* * * plaintiff (referring to respondent) was in no position to sell or grant a license for the use of his original screenplay, *to any other party in the world except of course, to the producer, Geiger Productions,* * * *" (Respondent's brief in the court below, p. 35).

That the learned Court of Appeals itself fully recognized this fundamental principle is revealed by the following from its "Opinion":

> "The film when completed could be published only with the joint consent of Geiger, *which held the movie rights in the novel* * * * (italics ours) (p. A-4, infra).

The Court of Appeals then formulated an entirely different theory as to how the respondent was allegedly injured by petitioner's distribution of the picture which included an assumption that Geiger, the producer, still retained the distribution rights:

> "Had appellant (referring to petitioner) not published the film it would have been salable to someone else *by Geiger* with plaintiff's consent." (p. A-4, infra).
>
> * * *
>
> "Geiger even if financially embarrassed, had a property salable in conjunction with plaintiff's (respondent's). * * * Until Eagle Lion distributed the film, plaintiff's rights were part of a salable bundle. Geiger, at least was a potential market for plaintiff's rights. When Eagle Lion (referring to petitioner) distributed the film * * * the market ended" (p. A-6, infra).

But this assumption completely disregarded the pivotal fact conceded in respondent's complaint (par. 28, p. 37a) and found as facts by both the District Court (Finding 14, p. 13a), as well as by the Court of Appeals itself (p. A-2, infra) that Geiger (the producer) had disposed of all of the distribution rights to General Film Distributors Ltd., of England, which in turn had sublicensed the U. S. A. distribution rights to petitioner.

Thus, the Court of Appeals incorrectly assumed that Geiger was still free to sell the distribution to others. The fact is that the producer no longer had a *"salable bundle"*

of distribution rights which it alone, or in conjunction with respondent, could sell to anyone. Geiger had nothing to put in the bundle, and respondent concededly had nothing that he could sell or convey to anyone in the world —except to his employer Geiger the producer, who alone owned the motion picture rights to "Christ in Concrete."

As to the amount of the damages, the Court of Appeals was of the view that $25,000 was proper since "the price agreed on between plaintiff and Geiger (the producer) is some gauge" (p. A-4, infra).

But even if we assume that the employment fee may have been the value of respondent's screen adaptation to the producer who was about to launch upon filming a picture, how can that amount determine the amount of the alleged injury from petitioner's distribution of the picture which proved a failure at the box-office? The Court of Appeals attempted to justify its utilizing the unpaid balance of the employment fee as a yardstick to admeasure respondent's alleged damages, by pointing to the rule of damages in anti-trust cases, citing *Bigelow* v. *RKO* (327 U. S. 251, 263, 266 (p. A-6, infra). But in the *Bigelow* case there was not merely proof of violation of legal rights; there was also satisfactory proof of the *fact* of injury. In the instant case, no injury was even possible since under the Copyright Law and cases in this Honorable Court, the producer's exclusive ownership of the motion picture rights rendered respondent's screen adaptation sterile—except in the hands of the producer.

Argument

The decisions of the Court of Appeals and the District Court are not merely departures from the accepted and usual legal principles formulated and applied by this Court but are in direct conflict with a long line of authorities in this Honorable Court as well as in the Court of Ap-

peals itself—which are to the effect that nothing in excess of nominal damages may be awarded where there is mere violation of legal rights, *without* resultant injury in fact. *Coupe* v. *Royer* (155 U. S. 565, 583); *Underwood Typewriter Co.* v. *E. C. Stearns & Co.* (2nd Cir. 227 Fed. 74, 83); *Dam* v. *Kirk La Shelle Co.* (2nd Cir., 175 Fed. 902, 908).

Infringement without injury—is insufficient to justify more than nominal damages.

In *Coupe* v. *Royer* (supra), which was an action for damages for defendant's infringing use of plaintiff's patented machine, this Honorable Court reversed a judgment for plaintiff, holding that in view of the fact that *"the evidence disclosing the existence of no license fee, no impairment of the plaintiff's market, in short no damages of any kind, we think the Court should have instructed the jury that if they found for the plaintiff at all, to find nominal damages only"* (p. 583). (Emphasis ours.)

In *Underwood Typewriter Co.* v. *E. C. Stearns* (supra), the Court of Appeals for the Second Circuit, in approving a denial of damages, where no resultant injury had been proven from the patent infringements, said:

> "But the difficulty in the case at bar is that the the complainant has offered no proof that can seriously be considered as entitling it to any recovery for damages. Damages cannot be awarded unless there is a ground on which a recovery of damages can be based.
>
> • • •
>
> "It has not been shown that the infringement by either defendant caused the slightest injury to plaintiff's business. No proof has been introduced that the plaintiff's sales were diminished by any cause during the infringing period" (p. 83).

The instant case is not to be confused with one where the script writer submits an original literary work, as dis-

tinguished from preparing a screen adaptation of a copyrighted literary work belonging to another. In the case at bar, injury was not even possible for as respondent himself conceded, and both lower courts recognized, under the Copyright Law (Section 1) and settled legal principles, respondent could not sell, publish, produce, or otherwise exploit the screen adaptation of Di Donato's copyrighted work—other than to make it available to his employer-producer. On the contrary, distribution of the picture is what respondent welcomed—whether by petitioner or any one else.

Respondent's deliberate inaction calculated to induce a motion picture distributor, such as petitioner, to distribute so as to improve respondent's chances of retrieving the producer's debt to him, estops respondent from claiming infringement and damages by reason of the distribution.

As we have already pointed out, respondent himself at all times deliberately refrained from instituting any proceedings or doing anything which might abort the completion of the picture or interfere with its distribution (R. pp. 120, 121, 131). Respondent expressly admitted, and the learned District Court found that:

> "Plaintiff recognized that his best chance of securing a payment on account of the amount due to him from Geiger Productions was to allow the production and distribution of the film" (p. 23a).

It was for this reason that respondent waited 47 days after actual release of the picture on December 20, 1949, before announcing in his letter of February 7, 1950, that he claimed title to the script (Ex. 7, p. 54a). Respondent did not desire to discourage any distributor. By February 7, 1950, petitioner was obligated not only to its licensor, but also to the exhibitors with whom petitioner contracted for the exhibition of the picture at their respective theatres.

This Honorable Court's observations in *Dickerson* v. *Colgrove* (100 U. S. 578), concerning the necessity to invoke estoppel when confronted with such inequitable conduct, are particularly appropriate:

> "The vital principle is, that he who by his language or conduct leads another to do what he would otherwise not have done, shall not subject such person to loss or injury * * * This remedy is always so applied as to promote the ends of justice" (*id.* p. 580).
>
> * * *
>
> "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he had induced others to suppose he would not rely on" (*id.* p. 581).

Thus, respondent's misleading and inequitable conduct obviously calculated to induce any distributor to release the picture in the hope that it will be a box-office success, should estop him from seeking damages even if he had sustained any. But as we have demonstrated—injury was impossible in view of the total absence of any rights in respondent to employ or exploit his screen adaptation of Di Donato's copyrighted work.

The Court of Appeals' determination announces a rule of confiscation which punishes the victim and not the defaulting wrongdoer.

Unless we assume that the Court of Appeals was laboring under a misapprehension i.e., that plaintiff's employer, the Producer had not parted with all distribution rights in the picture, we are constrained to interpret that Court's opinion as stating that when the Producer Geiger failed to pay respondent the balance of his employment fee, petitioner and *a fortiori*, G. F. D. Ltd., the principal distributor were obliged—as a matter of law—to cancel and reconvey their respective distribution rights to the Producer, in order to enable the Producer to try to sell those distribution rights to others in an effort to procure funds with

which to pay respondent. Such a rule of law, would automatically wipe out the distributor's and sub-distributor's rights, and completely disregard the distributors' contract obligations with their respective customers and disable them from even attempting to recoup their advertising and other operational expenses which they incurred in connection with the solicitation of theatre exhibition contracts.

This would indeed be a startling rule of damages. To put it still another way, the net effect of the Court of Appeals' determination, if adhered to, is to hold that where a distributor receives notice of a claim of infringement because of an alleged defect in the producer's title, the innocent distributor must be impaled upon this dilemma: to rescind the distribution rights, no matter how potentially valuable so that the producer, who breached his warranty of title, can join with the claimant in seeking a new market —or, if the producer refuses to accept the rescission, distributor must nonetheless refuse to perform the distribution agreement and suffer a suit for breach of the distribution agreement (contracted prior to the assertion of the claim) by his licensor, as well as by his exhibitor customers. The mere statement of the consequences of the Court of Appeals' determination, we respectfully submit, demonstrates its unsoundness.

If adhered to, it is not difficult to visualize the chaos it will introduce in all businesses involving the publication and distribution of literary properties.

In any event, there was no evidence that anyone was ready, able and willing to pay $25,000 for the U. S. distribution rights.

But even assuming that the Court of Appeals intended to announce such a confiscatory rule, *i.e.*, that General Film Distributors, Ltd. and appellant were under a rigid duty to reconvey the distribution rights to the Producer Geiger, because of Geiger's default to respondent so that the pro-

ducer and respondent could create "a salable bundle" to a new distributor—*there is no evidence in this record that there was another distributor ready, willing and able to buy "the salable bundle" from which appellee could retrieve the $25,000 balance of his employment fee.* Surely, the failure even to submit any such proof, prevents the application of the theory, of damages upon which the Court of Appeals' determination rests.

Reasons for Granting the Writ

The decision of the Court of Appeals sought to be reviewed herein is of transcending importance to all motion picture producers and publishers and distributors of copyrighted works of every description.

It transcends the shocking result which required petitioner to pay respondent the unpaid balance of the employment fee owed by the producer, as a penalty for refusing to surrender its distribution rights. Such surrender would have further entailed liability for breaches of exhibition contracts entered into by petitioner in reliance upon petitioner's distribution rights thus surrendered.

The rule announced by the Court of Appeals would thus require a distributor or a publisher, immediately upon receipt of a notice from a writer or collaborator that salary arrears had not been paid, to retain counsel to determine the precise legal relationship between the writer or collaborator and the principal author or producer. Furthermore, he would need to determine whether there had been any reservation of title to any portion of the script contributed by the writer or collaborator.

The distributor or publisher receiving such notice would be faced with the dilemma of discontinuing forthwith all further distribution of the motion picture or literary work in question; in the alternative, he would risk liability for

all sums the writer or c ollaborator might establish as being owed by the principal author or producer with whom the writer claimed collaboration.

We respectfully submit that such a confiscatory rule of law would inject such an undue speculative element into the businesses of motion picture distribution, production of plays and publishing of literary and musical works as to discourage the flow of investment into such enterprises. Moreover, the existence of such a rule would undoubtedly result in stimulating collusive claims of title which could readily be employed to coerce unwitting distributors and publishers who had made large investments and incurred liabilities in reliance upon the right to distribute to pay the debts of others rather than incur the losses which would result from a surrender of the distribution or publishing rights.*

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* The facts in the instant case graphically demonstrate that the decision in the case at bar will open a Pandora's box of mischievous and unfounded claims. It will be recalled that in the instant case respondent admitted that the reason that he refrained from taking any steps to prevent the completion or distribution of the picture until February 7, 1950 (which was considerably after the picture had been released for distribution) was because he "recognized that his best chance of securing a payment on account of the amount due him from Geiger Productions was to allow the production and distribution of the film" (see last page of Trial Court's "Decision," p. 23a). Thus, respondent succeeded in entrapping a distributor (in this case the petitioner herein) to assume the cost and obligations of distribution, which once launched, could not be terminated and the rights of distribution surrendered without serious financial consequences to petitioner. This is precisely the situation which respondent desired to place petitioner in, or any other distributor who would have undertaken the task of distribution. And because petitioner could not afford, and was, therefore, unwilling to surrender the distribution rights to the defaulting producer who still owed respondent $25,000, the Court of Appeals has now compelled petitioner to pay the producer's debt to respondent.

We respectfully submit, that a determination by the Court of Appeals which has such far-reaching consequences in the motion picture distribution and literary publishing worlds should be reviewed by the Supreme Court. Until this Honorable Court finally formulates the legal principles which should govern the respective rights and obligations of claimants to title *vis a vis* distributors and publishers of copyrighted works, lawyers will be unable to advise their clients definitively as to such respective rights and obligations.

Conclusion

Petitioner respectfully submits that this case is one calling for the exercise by this Honorable Court of its supervisory powers by writ of certiorari to the United States Court of Appeals, Second Circuit.

Dated: May 9, 1957.

Respectfully submitted,

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Appendix

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 146—October Term, 1956.

(Argued February 4, 1957 Decided March 19, 1957.)

Docket No. 24199

—o—

JOHN SZEKELY, also known professionally as JOHN PEN,
Plaintiff-Appellee,

v.

EAGLE LION FILMS, INC.,
Defendant-Appellant,

and

GENERAL FILM DISTRIBUTORS, LTD.; J. ARTHUR RANK, ROD GEIGER and NAT BRONSTEIN,
Defendants.

—o—

Before:

CLARK, *Chief Judge.*
MEDINA, *Circuit Judge,* and SMITH, *District Judge.*

Appeal by defendant in an action for infringement of common law copyright, from judgment for plaintiff in the amount of $25,000 plus interest, entered by the District Court for the Southern District of New York, Archie O. Dawson, *Judge,* 140 F. Supp. 843. Affirmed.

FITELSON AND MAYERS, New York City (Benjamin Aslan, Harold J. Sherman, Howard Gotbetter, New York City, of Counsel), for plaintiff-appellee.

PHILLIPS, NIZER, BENJAMIN & KRIM, New York City (Louis Nizer, Walter S. Beck, Seymour Shainswit, New York City, of Counsel), for defendant-appellant.

SMITH, *District Judge*:

In 1937 Pietro di Donato wrote a short story, which he later developed into a novel entitled "Christ in Concrete." The novel was published by Bobbs-Merrill and copyrighted in 1937 and 1939. Subsequently Rod E. Geiger Productions, Inc. acquired from di Donato an exclusive license to produce a motion picture based on his novel. To exploit this license Geiger Productions contracted with the appellee, Szekely, also known as John Pen, a well known and successful writer for the screen, to write a screen play based on this novel, all rights and title in the manuscript to remain in Szekely until he received the agreed minimum compensation for his efforts, $35,000. Szekely received only $10,000 from Geiger before he presented the final draft of his script in 1948, after which he received no further payments. Geiger ran into financial difficulties and found it necessary to make extensive revision to meet a reduced expense budget for the production. The Szekely script was modified by Barzman, a writer employed by Geiger Productions in 1948, and in 1949 the filming of the picture was commenced. Distribution rights to the film were granted to General Film Distributors, Ltd. of England which regranted their distribution rights in the Western hemisphere to the appellant, Eagle Lion Films. Plaintiff was informed by Geiger that his screen play was not being used in the movie version. After learning that it was being so used, plaintiff chose not to sue in England to

enjoin such use by Geiger, but notified defendant Eagle Lion of his rights in the movie in November 1949 prior to Eagle Lion's distribution, notified Eagle Lion in February 1950 of intention to bring action, and commenced suit on April 18, 1950.

Szekely brought suit against Eagle Lion and Rod Geiger, individually, on the alleged infringement of his common law copyright. The suit as against Geiger was dismissed by consent, on trial the claim for an accounting was abandoned, and from a judgment for Szekely against Eagle Lion for $25,000 damages and interest, Eagle Lion appeals.

Appellant's first point is that plaintiff was himself an infringer. There is no merit in this claim, for plaintiff's dramatization was made under contract with Geiger. Geiger was the holder of the right to dramatize by assignment from the author, owner of the copyright on the novel. Cf. *Photodrama Motion Picture Co.* v. *Social Uplift Film Corp.*, 2 Cir., 220 F. 448, 449.

Appellant's second point is that plaintiff's deliberate inaction led to Eagle Lion's distribution of the film, and that plaintiff is barred from recovery by estoppel and laches. It is difficult to see how this claim can be seriously advanced, for the court found, on competent evidence, that Eagle Lion had notice of plaintiff's claim several weeks prior to the first distribution and chose to ignore it, and there was other evidence that distribution continued after further warning and, indeed, for some years after suit was brought.

Appellant's third point is that plaintiff was merely a joint owner and that license from Barzman, co-owner, entitled the producer to publish without plaintiff's consent. This flies in the face of the contract itself, which retained title to the screen play in plaintiff until payment of the $25,000 balance agreed on. Plaintiff's Exhibit 5, paragraph 6. Moreover, Barzman's adaptation of plaintiff's screen play, to meet the producer's changed circumstances,

was not contemplated at the inception of the work, which was not planned as a joint work. Collaboration, if necessary, was contemplated by the contract, plaintiff's Exhibit 5, paragraph 11, but only on plaintiff's consent, which was not sought or obtained. The work was not, therefore, a joint work. Cf. *Shapiro Bernstein & Co.* v. *Jerry Vogel Music Co.*, 2 Cir., 221 F. 2d 569. Plaintiff completed and delivered his separate work. Geiger did not pay the balance due, not because the plaintiff's work was not complete, but solely because of Geiger's financial difficulties.

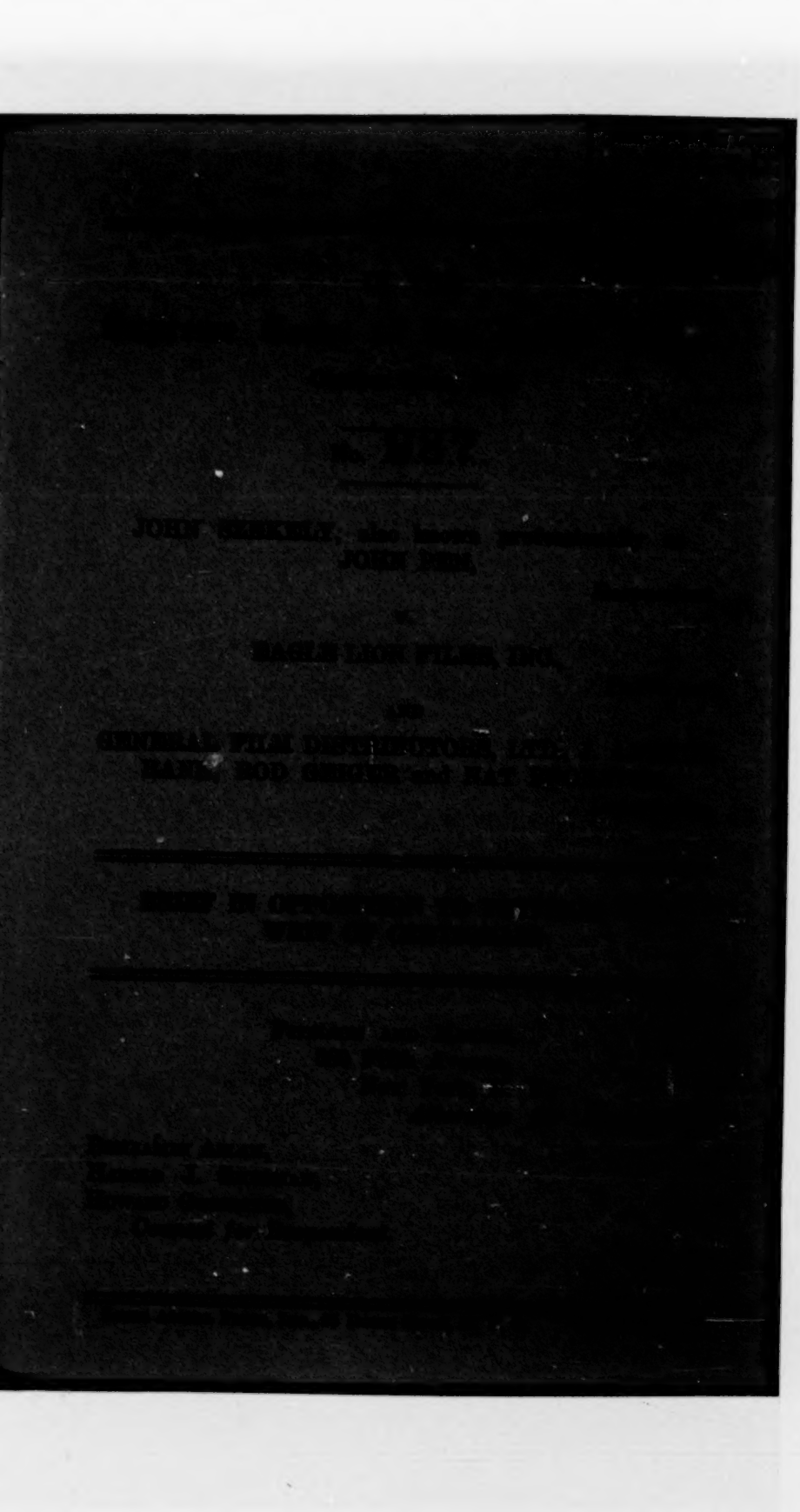
The film when completed could be published only with the joint consent of Geiger, which held the movie rights in the novel and in Barzman's work, and of plaintiff who retained as security the literary property in the screen play written by him under contract with Geiger. Appellant published the film with notice of plaintiff's property in the screen play incorporated in the film. Its publication brought in a return of $46,719.84 from which it remitted to Geiger $29,758.04 as the producer's share. Had appellant not published the film, it would have been salable to someone else by Geiger with plaintiff's consent. The right to withhold that consent as security for the $25,000 due plaintiff cannot be said to be entirely worthless. The film brought in to Geiger, from an American distributor who knowingly infringed plaintiff's copyright, $29,758.04. We do not know what if anything was realized from distribution outside the United States. Security title to the film play incorporated in the film became worthless only when the market for the film was destroyed by publication. The value of the security title is difficult to establish. However, the price agreed on between plaintiff and Geiger is some gauge. We cannot tell and need not speculate what the film would have done in the hands of another distributor. But a deliberate infringer should not be able to say that the screen play common law copyright was worthless because the infringer didn't make expenses on the infringe-

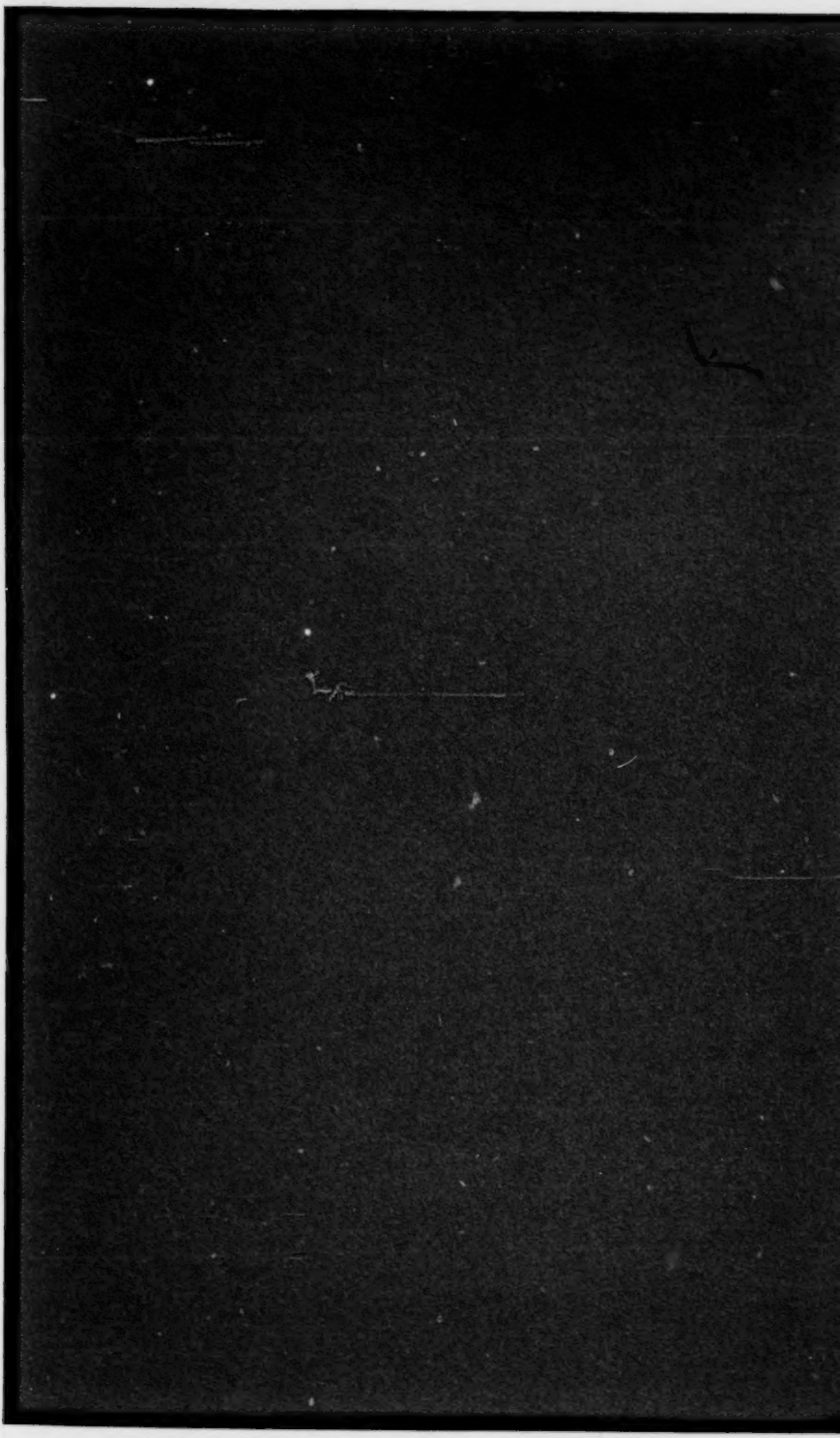
ment, in the face of its payment to the producer of an amount in excess of the amount as security for which the plaintiff retained the rights in the screen play. Geiger obtained $29,758.04 from appellant for American distribution rights to all that went into the production, including Geiger's movie rights in the novel and plaintiff's rights in the screen play. Yet neither that amount nor the $46,719.84 grossed by the infringer from the distribution, are allocated by the proof to the particular elements that went into the production and distribution. It is possible that shortcomings of the rewriting and production caused by Geiger's financial woes detracted from rather than added to the value of plaintiff's screen play. We need not speculate, however, for the evidence shows that plaintiff and Geiger in free bargaining, set a value on plaintiff's work of $35,000 plus 5% of any producer's profits. As security for the payment of $25,000 of that amount plaintiff's rights in the play were retained. There is nowhere any indication that plaintiff's work fell below the standard expected and contracted for by Geiger. The infringer cannot cast on the holder of the rights the burden of unscrambling the elements of value in the movie, when it deliberately infringed with notice of rights in it held as security. Such is the rule on accounting, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 2 Cir., 106 F. 2d 45, 48. Under the circumstances in the case at bar we may well adopt a similar rule where the issue is the value of a constituent portion of the picture exhibited by the infringer. Showing of the amount which the rights secured ($25,000) and that the infringer received and paid over to the producer, who had agreed to the security title, in excess of that amount is a sufficient showing of a value of $25,000 as against the infringer. Compensatory damages, as compensation, indemnity or restitution for harm sustained by a plaintiff for conversion of a chattel or destruction of any legally protected interest in land or other thing, include the exchange value of the subject matter or the plaintiff's interest therein at the time and place

of the conversion or destruction, or a different value where that is necessary to give just compensation. Restatement, Torts, sec. 927(a).

We may well apply that rule to the measurement of the damages due plaintiff for the conversion of his literary property here. The market value of that property as at least $25,000 at the time of the conversion is supported by its appraisal by plaintiff and Geiger in their dealings prior to the conversion. Even if it were held that those negotiations are not some evidence of a market value, under the second branch of the rule the plaintiff should be allowed to recover for the security value placed upon it and known to defendant before the conversion, as a different value necessary to give just compensation. This is not a case where there was no market for plaintiff's property. Geiger, even if financially embarrassed, had a property salable in conjunction with plaintiff's. The two together had a substantial value, as proved by the terms of acquisition of the territorial rights by Eagle Lion. Until Eagle Lion distributed the film, plaintiff's rights were part of a salable bundle. Geiger at least was a potential market for plaintiff's rights. When Eagle Lion distributed the film, in violation of plaintiff's rights, the market ended. The legal injury is certain. We should not allow difficulty in ascertaining precisely the value of the right destroyed, which difficulty arises largely from the destruction, to enable the infringer to escape without compensating the owner of the right. Compare the rule of damages in antitrust cases. *Bigelow* v. *R. K. O.*, 327 U. S. 251, 263-266.

Affirmed.





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

JOHN SZEKELY, also known professionally as JOHN PEN,
Respondent,

v.

EAGLE LION FILMS, INC.,
Petitioner,

AND

GENERAL FILM DISTRIBUTORS, LTD., J. ARTHUR RANK, ROD GEIGER and NAT BRONSTEN,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner, Eagle Lion Films, Inc. (Eagle Lion) seeks to have this court review the judgment of the Court of Appeals for the Second Circuit [1] [Charles E. Clark, Chief Judge, Harold R. Medina, Circuit Judge, and J. Joseph Smith, District Judge] which unanimously affirmed the

[1] Reported at 242 F. 2d 266, Appendix A-1-A-6.

judgment of the District Court for the Southern District of New York [2] [Archie Owen Dawson, District Judge], awarding respondent, John Szekely, also known professionally as John Pen (Szekely), the sum of $25,000 with interest as damages against petitioner for infringement of common law literary property rights. Rehearing was unanimously denied by *Per Curiam* order of the Court of Appeals dated and filed April 10, 1957.

There Is Neither a Statute Nor a Treaty of the United States, Nor Any Constitutional Issue, Nor Any Deviation by the Courts Below From Any Accepted and Usual Legal Norms of Judicial Determination, Involved in This Instant Petition for Certiorari. Accordingly, This Honorable Court Should Refuse to Assume Jurisdiction Over This Cause, and Deny the Petition

Respondent, Szekely, instituted suit in the District Court for the Southern District of New York for petitioner Eagle Lion's willful and intentional infringement, with knowledge, of his common law rights of literary property under the laws of the State of New York.

Jurisdiction of the District Court was based *solely upon diversity of citizenship* [3] existing as between all parties to the suit, and the amount in controversy being in excess of statutory requirements. In all the proceedings in the courts below, respondent Szekely's suit was treated solely as an action for the willful and deliberate conversion,

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[2] Reported at 140 F. Supp. 843, Appendix 9a-24a.

[3] Respondent, Szekely, at the time suit began, was a citizen of New York, and of the appearing defendants, petitioner, Eagle Lion was an Ohio corporation, and Rod Geiger was a citizen of California (pp. 30a-31a).

with knowledge, by Eagle Lion of Szekely's common law rights in literary property, which is no different than other personal property.

Neither the Act of July 30, 1947, c. 391, 61 Stat. 652, 17 U. S. C., §1 *et seq.*, commonly known as the Copyright Act, nor any other statute or treaty of the United States, was involved as the basis of, or controlling, the rights of Szekely's action in any proceedings in the courts below. The only reference to the Copyright Act by the courts below is made in the District Court's opinion (p. 18a) merely by way of incidental recognition that Szekely's common law rights in his dramatization were such as would entitle him to statutory protection under Section 7 of the Copyright Act, if, of course, he had registered under it. The mention by the trial court of the Copyright Act was merely a passing incident in its legal discussion, and never formed the basis for any of Szekely's rights or common law chose in action *ex delicto*.

It is apparent from the face of the petition that no question involving the United States Constitution has been raised.

Nor is there any disclosure of any departure by the courts below from the accepted and usual legal norms of judicial determination. It is evident from the opinions below, and as hereinafter demonstrated, that the unanimous decisions of the Court of Appeals and the District Court are in complete consonance with established controlling principles of federal and state law, as embodied in the decisions of the courts of the State of New York, and in the various federal courts throughout the nation, including this Honorable Court. There is absolutely no conflict of opinion and authority between the Court of Appeals for the Second Circuit and any other court, state or federal, as to the controlling legal principles governing

the determination of this instant case. And any question raised by petitioner herein is so well settled by judicial precedent that it would not be in the public interest to have it passed upon by this court.

In light of Rule 19 of this court, 28 U. S. C. A., and the standards governing review on certiorari, it is manifest that this case is *not* one in which "there are special and important reasons" for granting the writ, as required by such rule. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 73-74, 79 (1955), dismissing, as improvidently issued, a writ of certiorari previously granted.

Mr. Chief Justice Taft, in *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923), stated the controlling principles governing certiorari as follows (p. 163):

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.*" (Emphasis supplied.)

Accord: *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393; *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 73-74, 79.

This court, in the light of the considerations governing review on certiorari, as applied to the situation at bar, should deny the instant petition.

The Lack of Merit in Eagle Lion's Petition

There is no merit whatsoever in the instant petition of Eagle Lion for a writ of certiorari. It is replete with flagrant distortions and misleading truncations of the indisputable and established facts, artificial purported contradictions of undisputed facts, sophistical argumentation, and the assertion of strained, perverted, and vague general propositions outside of any realistic frame of reference to the facts determinative of their applicability, as well as a confusion of "issues".

The Facts

The salient, indisputable, and established facts as unanimously found by the courts below are as follows:

Some time in 1937, Pietro Di Donato wrote a novel entitled "Christ in Concrete", published by Bobbs-Merrill, and copyrighted in 1937 and 1939 (pp. 10a, A-2). Subsequently, Rod E. Geiger Productions, Inc. (Geiger Productions) acquired from Di Donato an exclusive license to make a film based upon Di Donato's book (pp. 10a, A-2).

Thereafter, Geiger Productions engaged respondent, Szekely, an Academy-Award-winning writer of recognized stature and reputation to write, and Szekely did write, a screen play based upon the book "Christ in Concrete" (pp. 10a, A-2).

Under the terms of his contract with Geiger Productions, respondent, Szekely, was to receive an aggregate of $35,000 and 5% of the producer's share of net profits from the film. Szekely retained all rights and title in his screen play until he received the minimal sum of $35,000 (pp. 11a, A-2, Pl. Ex. 5, p. 48a, R. p. 37).

It is undisputed that Szekely received only $10,000 from Geiger Productions, and that the $25,000 balance, upon payment of which Szekely's rights in his manuscript would pass to Geiger Productions, was never paid [4] (pp. 11a, A-2).

After Szekely presented the final draft of his script to Geiger Productions, in 1948, Geiger ran into financial difficulties, and found it necessary to revise production plans. Geiger also hired Ben Barzman, a local writer, in England, in 1948, as script editor (pp. 11a, A-2, Pl. Ex. 9, p. 57a, R. p. 58). In 1949, the filming of the picture began, at which time Szekely was informed by Geiger that *no part of Szekely's screenplay was being used in the motion picture version of the novel* (pp. 12a, A-2, Pl. Ex. 13, p. 58a, R. pp. 154, 155, Pl. Ex. 14, p. 60a, R. p. 165).

Geiger Productions granted distribution rights to the film, entitled "Give Us This Day", to General Film Distributors, Ltd., of England, which in turn, subgranted Western Hemisphere distribution rights to Eagle Lion. The licensing agreement between General Film Distributors and Eagle Lion contained an assurance from General Film Distributors that such film would not infringe upon common law rights or copyrights (p. 13a, R. p. 71).

In November, 1949, *nearly a month prior* to Eagle Lion's distribution of the film, respondent, Szekely, notified Eagle Lion, by letter dated November 29, 1949 (Pl. Ex. 6, p. 53a,

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[4] Respondent, Szekely, never overlooked any defaults in payment by Geiger Productions as suggested in petitioner's brief (p. 5). Since respondent had received $10,000 from Geiger Productions, it was reasonable for him to assume that all further payments would be forthcoming in the same good faith and fair dealing which attended payment to him of $10,000. However, when respondent finally pressed for payment, Geiger Productions informed him that "the present production plans in England has [sic] an entirely new script and containing no part of Mr. Pen's work" (Pl. Ex. 13, p. 58a, R. pp. 154-155, Pl. Ex. 14, p. 60a, R. p. 165).

R. pp. 198-199) of his rights in the premises, and specifically put Eagle Lion on notice that unless arrangements were made with respect to respondent's rights, he would be obliged to take such steps as necessary for the protection of his property rights, including commencement of injunction proceedings against the exhibition of such film with his work included (pp. 13a-14a, A-2–A-3, Pl. Ex. 6, p. 53a, R. pp. 198-199).

Thereafter, and on or about December 20, 1949—*nearly a month after respondent's prior letter of notification*—and in utter disregard of respondent Szekely's rights, Eagle Lion released the film for general distribution throughout the United States and in various other countries of the Western Hemisphere (pp. 13a, A-2, R. pp. 51-52). And this was done despite further notice to Eagle Lion of Szekely's rights in the form of a credit to respondent for the "adaptation", which was emblazoned on the film itself. Besides, newspaper reviews of the film on the day following the initial release, Eagle Lion's own documentary evidence, produced from its own files—Defendant's Exhibit E—contain the following credits:

> "An Eagle Lion Film release. Produced by Rod E. Geiger and N. A. Bronsten. Directed by Edward Dmytryk. Screen play by Ben Barzman. *Adapted by John Penn.* From the novel by Pietro Di Donato." [N. Y. Post, p. 60; N. Y. Journal-American, p. 21; issues of December 21, 1949; Def. Ex. E, 14a, R. p. 105; emphasis supplied.]

Despite respondent Szekely's clear written notice of November 29, 1949, and the notice of credit to respondent as "adapter" imprinted on the film itself, and published in the newspaper reviews of the film, and despite further written notice from Szekely to Eagle Lion, by letter dated February 7, 1950 (Pl. Ex. 7, pp. 54a, 14a, A-3, R. p. 20),

of Szekely's rights in his screenplay, and that such rights were still his property, and never disposed of, Eagle Lion, nevertheless, intentionally and defiantly continued its distribution of the film, which commenced December 20, 1949, and in fact distributed the film for some years after suit was commenced on April 18, 1950 (pp. 15a, A-3).[5]

Both the District Court and the Court of Appeals found as facts, based upon Eagle Lion's *own* accounting reports to General Film Distributors, Eagle Lion's Exhibits I and J (R. pp. 236-237), that the total gross receipts realized by Eagle Lion from distribution of the film was $46,719.84, and that the producer's (Geiger's) share of gross receipts from distribution was *$29,758.04* (pp. 15a, 21a, A-4).[6] Eagle Lion received in excess of $25,000 for

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[5] It is sheer hyprocrisy for petitioner, Eagle Lion, to contend that it never had notice of respondent Szekely's claim of title until February 7, 1950, in the face of the overwhelming evidence in the record and the unanimous findings by two courts below that "* * * Eagle Lion had notice of plaintiff's [Szekely's] claim several weeks prior to the first distribution and chose to ignore it, and there was other evidence that distribution continued after further warning, and, indeed, for some years after suit was brought" (Opinion, Smith, J., p. 871, A-3), and in the face of respondent's letter of notification dated November 29, 1949, and the credit given to Szekely for an "adaptation" *on the film itself and in the newspaper reviews* of December 21, 1949—the day following the initial release of the film. Under settled law, Eagle Lion is chargeable with full knowledge of all the facts which a diligent and timely inquiry by it would have disclosed. *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, 233; *Williamson* v. *Brown*, 15 N. Y. 354, 362.

[6] Petitioner's misleading statement at p. 7 of its brief that only $1320.76 was remitted to General Film Distributors can in no fashion diminish the unassailable facts as found by two courts below—that Eagle Lion collected $29,758.04 for the account of the producer, Geiger Productions, with whom it stood *"in pari delicto"*. Eagle Lion deducted certain costs, such as positive prints, advertising, shipping, laboratory costs, etc., from, and set them off against producer's share of gross receipts, thereby reimbursing itself from the aforementioned $29,758.04 percentage share of gross receipts which Eagle Lion

the account of Geiger Productions, which, as Eagle Lion knew, had also infringed upon Szekely's rights. Therefore, as recognized by the trial court (p. 22a), Eagle Lion stands *"in pari delicto"* with Geiger Productions—both being willful, deliberate infringers who realized in excess of the $25,000 security title held by Szekely, from their tortious utilization of Szekely's manuscript (pp. 21a, A-4).

Both the District Court and the Court of Appeals found as a fact that Eagle Lion was an intentional and deliberate infringer, with notice of Szekely's rights. In the face of such judicial determinations, Eagle Lion's contention that it was merely an "innocent distributor" is a flagrant falsehood, and an insult to the intelligence of this court.

POINT I

Eagle Lion's *intentional and deliberate* distribution, with notice of respondent's rights, and without his consent, of a film containing respondent's screen play, title to which respondent *retained as security* for payment to him of $25,000.00, completely destroyed the value of such security title. By destroying the value of respondent's rights in his screen play, Eagle Lion damaged respondent to the extent of at least $25,000.00, as correctly held by the District Court and the Court of Appeals.

The unassailable facts, as unanimously found by the two courts below, clearly show that Eagle Lion was an

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had collected for the account of Geiger Productions. The fact that Eagle Lion reimbursed itself out of such producer's share of receipts instead of paying over such sum, does not alter the fact that Geiger Productions' interest in moneys collected for its account by Eagle Lion was $29,758.04 (Def. Exs. I and J, R., pp. 236-237, pp. 15a, 21a, A-4).

intentional and willful infringer of respondent's literary property as embodied in the film which Eagle Lion distributed, with actual knowledge and notice of respondent's rights therein.

By letter dated November 29, 1949 (Pl. Ex. 6, p. 53a, R. pp. 198-199), Eagle Lion was given notice of respondent's rights *several weeks prior* to the initial release of the film, which was December 20, 1949. The *very film itself and newspaper reviews* following the first showing of the film gave respondent credit for an "adaptation" (Def. Ex. E, R. p. 105, N. Y. Post, p. 60, N. Y. Journal-American, p. 21, issues of December 21, 1949). And at the trial of this action, counsel for Eagle Lion brazenly acknowledged to the trial court that under the distribution agreement between Eagle Lion and General Film Distributors, "each year Eagle Lion *had the right to choose a number of pictures* distributed by General Film Distributors, Ltd. in England." *One of the films which Eagle Lion specifically chose to distribute,* under its contract with General Film Distributors *was the infringing motion picture* (R. pp. 69-70, 288). Thus, despite its knowledge of respondent's rights, Eagle Lion *deliberately* chose to distribute the infringing film, evidently relying on the warranty in its distribution agreement that such film would not infringe upon common law rights or copyrights (R. p. 71, Dist. Ct. Finding 14, p. 13a).

Liability of Eagle Lion

Eagle Lion's liability was predicated upon its intentional and deliberate distribution, with notice, of an infringing motion picture. *E. g.: Kalem Company* v. *Harper Brothers,* 222 U. S. 55 at 62-63; *Underhill* v. *Schenck,* 238 N. Y. 7 at 17. Respondent, as the owner of literary property willfully and intentionally converted by peti-

tioner, Eagle Lion, was thus entitled to an award of damages for the tortious conversion of his property. *DeAcosta* v. *Brown*, C. C. A., 2nd Cir., 146 F. 2d 408, cert. den. 325 U. S. 862.

Measure of Damages

At the time of Eagle Lion's tortious conversion of respondent's rights in his screen play, respondent still retained title to his screen play *as security* for the payment to him of $25,000. As far as respondent, Szekely, was concerned, this security title was worth at least $25,000—for it meant that no one in the world could use respondent's screen play unless and until respondent received the sum of $25,000.

Obviously, so long as Geiger Productions held the film rights to the novel, Szekely could only sell his screen play to Geiger Productions. But as long as the film containing Szekely's screen play remained unpublished and undistributed, Szekely and Geiger Productions *jointly* could sell their aggregate property rights as a single "salable bundle" to anyone. Eagle Lion, which had actual knowledge that it had no rights to distribute a film containing Szekely's screen play was itself a potential buyer for Szekely's rights. Knowing, as Eagle Lion well did, that it had no authority to commence the distribution of the film, Eagle Lion, under its blanket distribution contract with General Film Distributors could have *chosen and substituted* another film, in substitution for this one, to distribute (R. pp. 69-70, 288). Instead, Eagle Lion deliberately chose to distribute the film (R. pp. 69-70, 288), presumably relying on the assurances of title and obligations of indemnity in its distribution agreement. In so doing, Eagle Lion destroyed Szekely's security rights in his screen play and any potential market for such rights.

The legal injury to respondent, as stated by the Court of Appeals (A-6), was certain. Eagle Lion's distribution of the film destroyed a legally protected interest worth at least $25,000.00 by rendering respondent's security title to his screen play worthless. As this high court and other courts invariably have recognized, certainty of *cause* of damage is not to be confounded with mere elements of uncertainty in the computation of damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 263-268; *Wakeman* v. *Wheeler and Wilson Mfg. Co.*, 101 N. Y. 205, 209. And even where elements of uncertainty in computing damages exist, a court "may make a just and reasonable estimate of the damages based on relevant data, and render its verdict accordingly." *Bigelow* v. *RKO Radio Pictures, Inc., supra*, p. 264. For, as this high tribunal went on to state in the *Bigelow* case, *supra*, pp. 264-265:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created * * *.
>
> " 'The constant tendency of the courts is to find someway in which damages can be awarded where wrong has been done. Difficulty of its ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

In measuring damages sustained by the owner of converted property, the value of the property converted may, in law, be measured in terms of the "value to the owner". Restatement of the Law, Torts §911, Comment (e), §927 (c). The owner of literary property may testify, as respondent Szekely did in the case at bar, as to the property's worth and value to him, in computing the loss sustained by him, and that his property was rendered valueless by the unauthorized use of it.

Taft v. *Smith, Gray & Co.*, 76 Misc. 283, 284-285, App. Term, N. Y. Supreme Court, 1st Dept.;
MacGregor v. *Watts*, 254 App. Div. 904, 2nd Dept.;
Golding v. *RKO Pictures, Inc.*, 35 Cal. 2nd 690, 701; 221 P. 2d 95;
Kovacs v. *Mutual Broadcasting System, Inc.*, 99 Cal. App. 2d 56, 67; 221 P. 2d 108;
Stanley v. *Columbia Broadcasting System, Inc.*, 35 Cal. 2nd 653, 661; 221 P. 2d 73.

In a variety of cases, the courts have sustained awards of substantial damages on evidence of valuation given by the owner of the literary or artistic property wrongfully invaded. *E.g.*: $25,000 award upheld: *Golding* v. *RKO Pictures, Inc.*, 35 Cal. 2nd 690; 221 P. 2nd 95; $40,000 award sustained: *Universal Pictures Co.* v. *Harold Lloyd Corp.*, C. C. A. 9th Cir., 162 F. 2nd 354, where defendant unlawfully appropriated about 20% of plaintiff's film property; $25,000 judgment entered: *Kovacs* v. *Mutual Broadcasting System, Inc.*, 99 Cal. App. 2nd 56; 221 P. 2nd 108; $35,000 verdict affirmed; *Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal. 2nd 653, 666-667, 221 P. 2nd 73.

In the course of his testimony, respondent Szekely estimated the value to him of his literary property in his

original screenplay, to be at least in the sum of $25,000.00, but at a maximum of $50,000.00. He gave such estimate of value as an expert witness and as an Academy Award winner and a professional author of unusual stature, standing and reputation, over a period of over thirty-five years. He testified that under his contract dated November 13, 1947, he was entitled to receive the fixed sum of $35,000.00, in cash and, in addition, "5% of the producer's share" of the net profits derived from the marketing and distribution of the film, based on his original screenplay. And in this connection, he emphasized that the producer of the film stated that respondent's 5% of the producer's share of the profits, would "amount to at least $15,000.00" (R. pp. 27-29, 54-56 *et passim;* pp. 46a-47a).

As Hon. Archie O. Dawson, the trial judge, stated in his opinion,[7] with the unanimous endorsement of approval by the Court of Appeals:[8]

> "The special value to the plaintiff [Szekely] was the *value of the security interest which he had in the manuscript and which was security for the payment to him of $25,000.* That at least was the value to the plaintiff of the property which was tortiously appropriated by the defendant [Eagle Lion]." (Emphasis and bracketed insertion supplied.)

And as both the District Court and the Court of Appeals recognized, the award of damages to respondent, Szekely, is sustainable also on the basis that respondent, as the victim of a tortious deprivation of his property rights in his manuscript, is entitled to receive, at the very least, "the exchange value of the subject matter or the plaintiff's [Szekely] interest therein at the time and place

[7] 140 F. Supp. 843, 849-850; 21a.

[8] 242 Fed. 2nd [Ad. Op.] 266, 269; A-4-A-6.

of the conversion or destruction, or a different value where that is necessary to give just compensation." Restatement of Law, Torts, §927(a) (pp. A-5-A-6, 20a, bracketed material supplied).

Evidence of such exchange value to respondent of his property rights in his screen play which was so deliberately appropriated and commercially exploited by petitioner, Eagle Lion, is readily found by reference to the minimum price of Thirty-Five Thousand ($35,000) Dollars as clearly fixed in the contract previously made between respondent, Szekely, and Geiger Productions in the course of open and arms-length bargaining and at a time long before any invasion of Szekely's rights and the existence of any dispute whatsoever. As prior to the invasion of respondent Szekely's property rights, Geiger Productions had paid him the sum of Ten Thousand Dollars ($10,000), the unpaid sum of Twenty-Five Thousand ($25,000.00) Dollars at the time of the conversion of his property rights represented precisely the exchange value to him. In a substantial legal sense, such sum of Twenty-Five Thousand ($25,000.00) Dollars represents, as unanimously held by the Court of Appeals, "the market value of that property * * * at the time of the conversion * * * supported by its appraisal by plaintiff [respondent] and Geiger in their dealings prior to the conversion." [A-6, bracketed insertion supplied.] Patently, such prior business negotiations between respondent, Szekely, and Geiger Productions and the price arrived at by their mutual agreement in the open market and at arms-length, and the surrounding circumstances at the time of the conversion constituted legally recognizable "relevant data" on which courts "may make a just and reasonable estimate of the damage." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 at 264.

The burden squarely rested on petitioner, Eagle Lion, as a deliberate and unconscionable piratical infringer of

respondent Szekely's literary property rights, to unscramble the elements of value in the film "Give Us This Day". *Sheldon* v. *Metro Goldwyn Pictures Corporation,* C. C. A., 2nd Cir., 106 Fed. 2nd, 45, 48; aff'd 1940, 309 U. S. 390. Such burden cannot be shifted by the wrongdoing petitioner, Eagle Lion, to its victim, respondent Szekely. Having utterly failed to avail itself of its opportunities in its "full day" in court to sustain its burden of proof to unscramble such elements of value in the film, petitioner, Eagle Lion, is conclusively bound by the proofs adduced by respondent, Szekely, which established his right to an award of damages in the sum of Twenty-Five Thousand ($25,000.00) Dollars as representing his security and exchange value for the literary property rights of which he was tortiously deprived by petitioner, Eagle Lion. Mere difficulty of ascertainment with absolute precision of the value of property rights destroyed—particularly when such difficulty arises largely from a tortious wrongdoer's acts of destruction, can never enable such wrongdoer to escape the moral and legal consequences of his wrongdoing without full compensation to the owner of the property rights involved as is reasonably determinable under the law. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251, 263-266.

The award of damages as made by the District Court to respondent, Szekely and as unanimously affirmed by the Court of Appeals, represents a finding of fact, and, since it is supported by the evidence, is unassailable on appeal. *Sanders* v. *Leech,* C. C. A. 5th Cir. 1946, 158 F. 2nd 486, 487; *Brink's, Inc.* v. *Hoyt,* C. C. A. 8th Cir., 1950, 179 F. 2nd 355, 360; *Cleo Syrup Corp.* v. *Coca Cola Co.,* C. C. A., 8th Cir., 1943, 139 F. 2nd, 416, 417, cert. den. 321 U. S. 781.

If, as petitioner Eagle Lion, ludicrously contends, the imposition by the courts below of liability upon petitioner, Eagle Lion, for the payment of damages to respondent,

Szekely, for the tortious willful destruction of his property is "confiscatory", then all judicial determinations fixing responsibility upon tortious wrongdoers for payment of damages for the injuries intentionally inflicted by them must of necessity be in the same category of "confiscation." But, patently, Eagle Lion's cry of "confiscation" is wholly without merit in fact and law in the case at bar.

POINT II

There is absolutely no merit to Eagle Lion's contention that Szekely is estopped from claiming infringement and damages by reason of Eagle Lion's distribution activities.

The facts at bar do not show respondent, Szekely, was guilty of any unreasonable delay in asserting his rights in his screen play and commencing this suit. On the contrary, respondent at all times acted with the utmost diligence in the protection of his rights.

Early in January, 1949, respondent, Szekely was specifically advised by Geiger Productions that "no part of the script which was prepared by Mr. Pen is being used in the production of the motion picture as presently planned" (pp. 12a, A-2, Pl. Ex. 14, p. 60a, R., p. 165). Subsequently, by letter dated February 1, 1949, Geiger again informed respondent that his screen play would not be used in the film, and at the same time, held out some hope to Szekely that payment would be made, and that Geiger Productions would "do everything to protect Mr. Pen" (pp. 12a, A-2, Pl. Ex. 13, p. 58a, R., pp. 154-155). As the trial court recognized:

> "Plaintiff's [Szekely] failure to seek to enjoin the filming operation in England is not such as can be called unreasonable, in view of the letters received by him from the attorney for Geiger. The first of these letters stated that no part of his script was

> being used in the production, which would certainly lull him into a belief that he had no cause of action. The other letter gave him hope that if the film was completed, payment would be made to him, but that no payment could then be made to him because of the ban on the export of dollars. These statements made it reasonable for plaintiff [Szekely] to withhold action until the film was produced in the hope that at that time, a payment would be made to him" (p. 18a, bracketed material supplied).

In November, 1949, respondent Szekely learned from publicity in United States newspapers that the film was produced and soon to be distributed, and promptly notified Eagle Lion of his rights by letter as early as November 29, 1949—nearly a month *prior* to Eagle Lion's release of the film for general distribution in the United States. Notwithstanding this written notice of respondent's rights *before* its first release of the film, and notwithstanding the notice plainly imprinted on the film itself, giving respondent credit for the "adaptation", Eagle Lion brazenly and deliberately *chose* to distribute the infringing film, beginning December 20, 1949.[9]

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[9] It is the height of disingenuousness for Eagle Lion to contend (p. 17n) that failure of respondent [Szekely] to prevent completion or distribution of the film entrapped Eagle Lion into distributing the film and incurring costs of distribution. This is so particularly in the light of (a) the credit given to respondent [Szekely] for the "adaptation" plainly imprinted on the film itself which gave Eagle Lion notice of respondent's literary rights long before Eagle Lion began releasing and distributing the film on December 20, 1949, (b) the notification given by respondent [Szekely] to Eagle Lion of his rights in his screen play by letter dated November 29, 1949—nearly a month prior to Eagle Lion's release of the film for general distribution in the United States, (c) the deliberate selection and distribution of the infringing film with knowledge of respondent's rights and relationship as adaptor to such infringing film, despite the fact that under its blanket distribution contract with General Film Distributors, Eagle Lion had the right to

And Eagle Lion deliberately proceeded with its distribution of the film in utter disregard of respondent's second letter, dated February 7, 1950 (pp. 14a, A-3, Pl. Ex. 7, p. 54a, R., p. 20), and the commencement of this action on April 18, 1950—only about four months after Eagle Lion first released the infringing film (pp. 15a, A-3)—*continuing its distribution for some years after this action was begun* (pp. A-3, 15a). Eagle Lion did this even though under its blanket distribution contract with General Film Distributors, Eagle Lion had the right to substitute for the infringing film any other film of the entire group of films embraced in such distribution contract (R., pp. 69-70, 288).

As the trial court held:

> "In any event, plaintiff [Szekely] did not sleep upon his rights. He asserted his claim. He instituted this action" (p. 19a).

Eagle Lion again urged this contrived so-called "estoppel defense" in its brief to the Court of Appeals, which, upon the established facts and law, rejected it:

> "Appellant's [Eagle Lion] second point is that plaintiff's [Szekely] deliberate inaction led to Eagle Lion's distribution of the film, and that plaintiff

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substitute another film from the group of pictures it had access to under such distribution contract, in place of the infringing film, and (d) the deliberate continuation of distribution by Eagle Lion *for several years* after December 21, 1949 when the newspaper reviews of that date gave respondent credit for an "adaptation," in gross willful defiance of respondent's further written notification and protest of February 7, 1950. The incontestable facts in the record sharply expose Eagle Lion's "entrapment" argument as sheer sham, made with crocodile tears. Clearly if under the circumstances at bar Eagle Lion was entrapped, then its entrapment is the result of its own piratical cupidity and its callous and reckless disregard of respondent's rights in his screen play (pp. 14a-15a, A-3-A-4, R., pp. 69-70, 288, Pl. Ex. 6, p. 53a, R., pp. 198-199, Pl. Ex. 7, p. 54a, R., p. 20, Def. Ex. E, R., p. 105, Def. Ex. I and J, R., pp. 236-237).

> [Szekely] is barred from recovery by estoppel and laches. It is difficult to see how this claim can be seriously advanced, for the [trial] court found, on competent evidence, that Eagle Lion had notice of plaintiff's claim several weeks prior to the first distribution and chose to ignore it, and there was other evidence that distribution continued after further warning and, indeed, for some years after suit was brought'' (p. A-3; bracketed material supplied).

This clear holding by the Court of Appeals, affirming the finding of fact of the District Court, is supported by the great weight of evidence in the record, and completely demolishes any contention by Eagle Lion that Szekely is estopped from asserting his claim.

Conclusion

If ever there was a defeated litigant whose position was so palpably unworthy of the certiorari writ of this high court, it is unquestionably, Eagle Lion, the petitioner herein.

The Petition Should Be Denied.

Dated: June 7, 1957.

Respectfully submitted,

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